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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 791.

JOSEPH ARRINGTON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

REPLY BRIEF OF PETITIONER
To Respondent's Brief in Opposition to Petition For Writ of Certiorari.

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I.

For reasons that shall remain unexplained the Respondent preferred not to address any argument to the serious impropriety involved when an attorney, the Canons of Ethics to the contrary notwithstanding, communicates upon the subject of controversy with a party represented by counsel. In our judgment some response was required, and the fact that these contentions have gone unchallenged adds to their cogency. Surely this must be so: For it would be an unwarranted impeachment of the legal learning of Respondent's counsel to intimate, even if they did not know then, that they have not come to realize that a prosecutor's action in questioning an indicted accused without the knowledge or presence of his counsel cannot be squared with the Canons. Stated another way, their having done so to the prejudice of this Petitioner cannot be validated on the basis of any meaningful precedents.

On the other hand, it is quite possible that the intentional design of Respondent's Brief was to divert the Court's consideration to only one aspect of Petitioner's contentions. And, it is quite possible that a point is made in their discursive argument. On the other hand, if such point is that the trial Court theorized there was a "waiver" of counsel and such determination was affirmed by the Ohio Supreme Court; therefore, this Court ought not intervene. Then such argument is beside the point because "[N]o binding weight can be attached to the State determination. The constitutional requirement is greater. The State Court cannot have the last say when it * * * may have misconceived a federal constitutional right." *Brown v. Allen* (Opinion of Mr. Justice Frankfurter), 344 U. S. 443, at 508.

Not only this but the inclusion in their analysis of *Dorado v. California,* 42 Cal. 2d 169, and *People v. Stewart,* 43 Cal. Rptr. 201, as being consistent with their waiver thesis is somewhat difficult to comprehend. The same is true of their attempt to distinguish *People v. Waterman,* 9 N. Y. 2d 561, on the theory that: "Whatever secrecy was involved in the interviews with Arrington was at his own instigation" (Brief in Opposition, page 21).

Even more glaring is Respondent's treatment of *People v. Meyer,* 11 N. Y. 2d 162 (which they apparently would have this Court resolve on the basis of the dissenting opinion) and *People v. Rodriguez,* 11 N. Y. 2d 279 (which they are erroneously convinced was decided exclusively on Fourth Amendment principles). Of course, it cannot be denied the dissenting opinion in *Meyer* is a minority opinion, and *Rodriguez* did contain a mention of the Fourth Amendment. The point of these cases, however, and principle that emerges from them is that in New York any interrogation in the absence of counsel after criminal proceedings have been commenced is forbidden.

II.

In sum, it is the argument of Respondent that: Although the Supreme Court of Ohio originally reasoned to the conclusion that Arrington's cause was controlled by their opinion in *State v. McLeod,* 1 Ohio St. 2d 60 (which conclusion was suddenly abandoned when this Court's opinion in *McLeod v. Ohio,* 381 U. S. 356, sapped their earlier opinion in this case [that is, in *State v. Arrington,* 2 Ohio St. 2d 172] of its vitality), they now agree with that Court's subsequent opinion on the same facts to the effect that "the facts in the instant case bear no resemblance to either *McLeod* or *Massiah.*" See *State v. Arrington,* 3 Ohio St. 2d 61.

Further noting that Respondent had previously argued (in their Brief before the Supreme Court of Ohio, pp. 21-22) that Petitioner's case was controlled by *State v. McLeod,* which they distinguished from *Massiah* on the same basis as the Ohio Supreme Court had distinguished *McLeod* from *Massiah,* it is our contention that if this fact alone is not significant it at least exposes either a willingness on Respondent's part to allow their notions of due process to fluctuate so as to encompass any theory, even general principles, if it will only sustain this conviction.

CONCLUSION.

For the foregoing reasons, as well as for the reasons set forth in the Petition for Writ of Certiorari, Petitioner renews his prayer that his Petition be granted and upon review that his conviction be revised.

Respectfully submitted,

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Attorney for Petitioner.